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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Review of the Commission's)

Broadcast and Cable)

Equal Employment Opportunity)

Rules and Policies)

MM Docket No. 98-204

JOINT COMMENTS OF
EVENING POST PUBLISHING COMPANY AND
GREAT EMPIRE BROADCASTING, INC.

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SUMMARY

Equal employment opportunity should unquestionably be accepted by broadcasters as a societal goal. While everyone agrees that discrimination has no place in the broadcasting industry, the question facing the Commission in this rulemaking proceeding is whether the FCC can, and should, assert authority to impose mandatory equal employment opportunity (“EEO”) rules on broadcasters. Because the Commission’s authority to promulgate EEO rules is questionable under the First Amendment, and because the rules the Commission proposes in the *Notice* are unconstitutional under the Equal Protection Clause of the Fifth Amendment, the Commission cannot impose specific EEO requirements on broadcasters. Other federal governmental agencies, such as the Equal Employment Opportunity Commission (“EEOC”) are already charged with the task of policing discrimination in all industries, and the Commission cannot, and should not, attempt to duplicate that function.

The initial question the Commission must answer before it can adopt any EEO regulations is where it derives its authority to act in this area. Despite the various statutes the Commission points to in the *Notice*, the fact remains that Congress has not given the Commission explicit statutory authority to impose EEO regulations on broadcasters. Any Commission authority to adopt EEO regulations must, therefore, be derived from the Commission’s general “public interest” mandate. To that end, the Commission has asserted an interest in promoting “programming diversity” under its public interest mandate, saying that “programming diversity” is advanced by broadcast EEO regulation.

Advancing an interest in “programming diversity,” however, raises questions under the First Amendment. Thus far the Commission has not specifically defined what it means by the

term “programming diversity,” yet it appears to acknowledge that the term encompasses minority and female programming. If this is the case, the Commission must explain how it can have an interest in promoting certain types of speech over other types of speech and not violate the First Amendment. Until the Commission does so, it has no authority to impose any sort of broadcast EEO regulation.

Assuming, however, that the Commission can demonstrate it has the requisite authority to adopt broadcast EEO regulations, the regulations it adopts must not violate the Equal Protection Clause of the Fifth Amendment. Consequently, FCC EEO regulations must be race-neutral and must not require broadcasters to consider race in recruiting or hiring. The Commission’s proposals in the *Notice*, however, are anything but race-neutral. They are, indeed, explicitly “race-conscious” in a manner that is constitutionally impermissible under the D.C. Circuit’s recent decision in *Lutheran Church*. Because the Commission’s proposed EEO regulations would require broadcasters to reference local labor force statistics and consider race during virtually all aspects of the hiring process, they cannot withstand constitutional scrutiny and cannot be adopted.

As acknowledged by Chairman Kennard, when the D.C. Circuit found the FCC’s broadcast EEO rules invalid, the broadcasting industry stepped forward and pledged to continue voluntarily its efforts to promote equal employment opportunity for all. Broadcasters recognize that they will lose if they fail to reach into their local communities to attract the best talent, and that they have nothing to gain if they fail to program in a manner that is of interest to their local audiences. Broadcasters should, therefore, be permitted to design their own EEO programs in the manner that best serves each station in its own market. At most, therefore, broadcasters

should be required to have an EEO program that complies with any applicable EEOC, state or local requirements, recruit in a general manner for most open positions, and not discriminate. Any more expansive FCC EEO regulations would be unnecessary and unconstitutional, and should not be adopted.

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**JOINT COMMENTS OF
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Evening Post Publishing Company and Great Empire Broadcasting, Inc. (the "Joint Parties"), by their attorneys, file these comments in the Commission's proceeding reviewing its equal employment opportunity ("EEO") rules.^{1/}

The Joint Parties strongly support equal employment opportunity and firmly believe that discrimination has no place in the broadcast industry. As Commissioner Powell has said, "[i]f the public interest means anything at all it cannot possibly tolerate the use of a government license to discriminate against the citizens from whom the license is ultimately derived."^{2/} While all concerned agree that broadcasters should "reach into their communities and create opportunity for talented men and women of all colors,"^{3/} the issue in this proceeding is whether the FCC can, and should, impose mandatory EEO rules on broadcasters.

^{1/} See *In the Matter of Review of the Commission's Broadcast and Cable Equal Opportunity Rules and Policies*, Notice of Proposed Rulemaking, MM Docket No. 98-204, FCC 98-305 (released November 20, 1998) (the "Notice").

^{2/} Notice, Separate Statement of Michael K. Powell at 1.

^{3/} Notice, Separate Statement of Chairman William Kennard and Commissioner Gloria Tristani at 2.

Here, where industry leaders have already pledged that they will continue to follow EEO principles regardless of whether they are legally required to do so,^{4/} the FCC should step back and allow broadcasters to reach into their own communities as they see fit. Other state and federal agencies already enforce anti-discrimination laws, and the FCC need not duplicate that function. Indeed, it is questionable whether the Commission even has the authority to impose mandatory EEO requirements on the broadcasting industry.^{5/} Unless, and until, the Commission establishes first, that it has the requisite authority and second, a constitutional nexus between broadcast EEO regulation and a valid governmental interest, the Commission may not impose any sort of EEO regulation on broadcasters at all.

I. UNDER *LUTHERAN CHURCH*, THE FCC MUST FIRST DETERMINE WHETHER IT HAS THE AUTHORITY TO IMPOSE EEO REGULATION ON THE BROADCAST INDUSTRY.

FCC EEO broadcast regulations have been in place for over 25 years.^{6/} Over that time the Commission has refined the rules, but the basic requirements have remained essentially the same. What has changed over time is the United States Supreme Court's interpretation of the Equal Protection Clause of the Fifth Amendment.^{7/} While the Court has upheld some race-based

^{4/} *Id.* at 1.

^{5/} See *Lutheran Church - Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), *petition for reh'g denied*, 154 F.3d 487, *petition for reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998) ("*Lutheran Church*").

^{6/} *Notice* at ¶ 26.

^{7/} Equal protection requires the government to deal with similar persons in a similar manner, and mandates that regulatory classifications not be based upon impermissible criteria or used arbitrarily to burden groups of individuals. While all regulatory classifications that

(continued...)

governmental programs in the past,^{8/} in 1995, in *Adarand Constructors, Inc. v. Pena*, the Court found that even the federal government's race-based programs must be examined under a strict scrutiny standard.^{9/}

Lutheran Church provided the first post-*Adarand* examination of the FCC's EEO rules. In *Lutheran Church*, the D.C. Circuit not only held the Commission's EEO program requirements unconstitutional, it specifically directed the Commission to determine whether it has the authority to promulgate even an employment non-discrimination rule.^{10/} The Court questioned the Commission's authority to adopt EEO rules, stating that "[t]he only possible statutory justification for the Commission to regulate workplace discrimination would be its obligation to safeguard the 'public interest,' and the Supreme Court has held that an agency may

7/ (...continued)

differentiate between similarly-situated persons or firms must be at least rationally related to a legitimate state interest, distinctions with respect to suspect classifications such as race must be judged under a much more exacting standard of strict scrutiny. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) ("*Adarand*").

8/ See, e.g., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (upholding FCC policy of awarding enhancements for minority owners in comparative proceedings); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding the "minority business enterprise" provision of the Public Works Act of 1977 that required that at least 10% of federal funds granted for local public works be used by the state or local grantee of the funds to procure services or supplies from businesses owned by members of minority groups). See also *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969 (6th Cir. 1991) (upholding statute and regulations granting preferential treatment to "disadvantaged business enterprises").

9/ *Adarand*, 515 U.S. at 2113. Under strict scrutiny, a regulation is constitutional only if it is narrowly tailored to serve a compelling governmental interest. Race-neutral measures, in contrast, are subject only to the "rational relation" standard which holds such measures constitutional so long as they are rationally related to a legitimate state interest. See, e.g., *Pennell v. City of San Jose*, 485 U.S. 1 (1988).

10/ *Lutheran Church*, 141 F.3d at 356.

pass anti-discrimination measures under its public interest authority only insofar as discrimination relates to the agency's specific statutory charge."^{11/} Thus, before re-establishing any EEO regulation of the broadcast industry, the Commission must first establish its authority to do so. Unless the Commission can show that it has the requisite authority, the Commission cannot lawfully impose EEO regulation on the broadcast industry.

A. The Commission Has No Express Statutory Authority for Imposing Broadcast EEO Regulation.

Congress provides the Commission with its statutory authority, and there is no question that Congress could expressly authorize the Commission to regulate workplace discrimination in the broadcast industry as it did, for example, with the cable industry.^{12/} As the *Notice* illustrates, however, the Commission cannot cite any explicit grant of authority because Congress has not chosen to provide it.

In its search for authority, the Commission reaches first for "Congressional ratification" of its prior EEO regulations based on Section 334 of the Communications Act.^{13/} Section 334 prohibits the Commission from changing its broadcast EEO regulations in effect as of September 1, 1992, except for technical revisions.^{14/} The Commission notes that the Conference Report on Section 334 stated that the section "codifies the Commission's equal employment opportunity

^{11/} *Lutheran Church*, 141 F.3d at 354 (citing *NAACP v. FPC*, 425 U.S. 662 (1976)).

^{12/} *See, e.g.*, 47 U.S.C. § 554.

^{13/} *Notice* at ¶ 26.

^{14/} *See* 47 U.S.C. § 334(a).

rules” for television licensees.^{15/} The Commission argues that Section 334 and its legislative history send a clear signal that Congress approved of the Commission’s EEO rules and, by logical extension, the Commission’s authority to promulgate such rules.

Nevertheless, this “ratification” is of extremely limited significance. Section 334 did not give the Commission explicit authority to adopt broadcast EEO regulations. Indeed, Section 334 is framed in the negative — it limits, rather than expands, the Commission’s authority. Section 334 essentially froze the Commission’s television broadcast EEO regulations as of September 1, 1992, leaving the Commission with no authority to take additional action.^{16/}

The *Notice* fails to acknowledge the relationship between Section 334 and Section 22 of the 1992 Cable Act, the second statutory section cited by the Commission as a source of authority for the *Notice*’s proposed rules. Attempting to portray Section 22 as an independent source of statutory authority separate and apart from Section 334, the Commission quotes Section 22(a) of the 1992 Cable Act and its language regarding equal employment opportunity in the cable and broadcast television industries.^{17/} The legislative findings incorporated into Section 22(a) fail to advance the Commission’s cause, however, because Section 22 adopted Section 334 of the Communications Act (discussed above). Section 22 thus is inseparable from Section 334 of the Communications Act; indeed, they are one and the same. Consequently, Section 22 of the

^{15/} *Notice* at ¶ 27.

^{16/} Further, as the *Notice* acknowledges, Section 334 applies to television licensees only. See *Notice* at ¶ 28. Section 334 therefore says nothing about the Commission’s authority to change its EEO policies with respect to radio licensees.

^{17/} *Notice* at ¶ 29.

1992 Cable Act supplies no independent statutory authority for the Commission to adopt broadcast EEO rules.

Further, it could be argued that Section 22 of the 1992 Cable Act specifically shows that Congress *did not intend* for the Commission to have statutory authority to take action on broadcast EEO matters. Section 22 amended the explicit authority given to the FCC to adopt and enforce EEO regulations applicable to *cable operators and other multichannel video program distributors*; broadcast licensees were not included. Congress obviously knew how to give the Commission authority to impose EEO requirements on a specific industry segment, and it did not give the Commission that authority with respect to broadcasters in Section 22.

Finally, the Commission's reliance on Section 309(j), the third statute cited by the Commission as a source of potential authority for broadcast EEO regulation, is also misplaced. Section 309(j) concerns the use of competitive bidding for commercial broadcast licenses, not equal employment opportunities. While Section 309(j) does direct the Commission to broadly disseminate spectrum licenses in general, the sections of 309(j) quoted in the *Notice* as support for the Commission's authority to adopt broadcast EEO regulations were adopted as part of the Commission's initial auction authority in 1993, at a time when the Commission was not authorized to auction broadcast spectrum. The portions of Section 309(j) quoted in the *Notice* thus have nothing to do with the Commission's authority over the broadcast industry.

The *Notice* also fails to point out that the Commission was forced to draw back from its attempt to implement the portion of Section 309(j) that calls for the dissemination of licenses "among a wide variety of applicants, including . . . businesses owned by members of minority groups and women. . . ." after the Supreme Court's decision in *Adarand*. Indeed, post-*Adarand*,

the Commission eliminated the preferences previously given to females and minorities in its spectrum auctions because it did not believe it had the record required by *Adarand* to support such preferences.^{18/} Thus, while Section 309(j) shows Congress' interest in the broad dissemination of all spectrum licenses, including broadcast licenses, it does not provide the Commission with the authority to adopt employment discrimination rules for broadcasters.

Sections 334 and 309(j) of the Communications Act and Section 22 of the 1992 Cable Act, and their legislative histories, show Congressional approval of special considerations for minorities and women. They do not, however, provide the Commission with explicit statutory authority to promulgate broadcast EEO rules. Accordingly, the Commission must look elsewhere if it is to find the authority it needs to adopt the broadcast EEO rules proposed in the *Notice*.

B. The FCC's Public Interest Mandate Does Not Confer Authority to Impose Broadcast EEO Regulations.

Since Congress has not explicitly directed the Commission to impose EEO regulations on broadcasters, such authority must be derived, if at all, from the Commission's authority to regulate in the "public interest." As noted above, the *Lutheran Church* court stated that the Commission's public interest authority was the "only possible statutory justification for the Commission to regulate workplace discrimination."^{19/} In the *Notice*, therefore, the Commission

^{18/} See *In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, Sixth Report and Order, PP Docket No. 93-253, FCC 95-301 (released July 18, 1995). Today, over three years later, the Commission still has not achieved a record sufficient to re-introduce female and minority auction preferences.

^{19/} *Lutheran Church*, 141 F.3d at 354.

states that “programming diversity” is an interest encompassed by the Commission’s public interest mandate, and that broadcast EEO regulation furthers programming diversity.^{20/}

The Commission’s reliance on “programming diversity” as authority for adopting EEO regulation does not comport with the court’s decision in *Lutheran Church*. The *Lutheran Church* court was openly critical of “viewpoint diversity,” suggesting that such an interest not only failed to survive an equal protection challenge but also “may well give rise to enormous tensions with the First Amendment.”^{21/} Indeed, the court stated that “. . .the interest in diversity of viewpoints provides no legitimate, much less important, reason to employ race classifications apart from generalizations impermissibly equating race with thoughts and behavior.”^{22/}

The *Notice*, however, skims over the court’s criticism of the “programming diversity” rationale. Ignored, first of all, is the court’s concern that the term “programming diversity” is devoid of meaning. Indeed, the Commission fails, both before the court and in the *Notice*, to define the term. While the Commission states that diverse programming is “programming that reflects the interests of minorities and women in the local community, as well as those of the community at large,”^{23/} the Commission also states that it does “not assume that minority and female employment will always result in minority and female-oriented programming.”^{24/} If,

^{20/} *Notice* at ¶¶ 41-43.

^{21/} *Lutheran Church*, 141 F.3d at 354.

^{22/} *Lutheran Church*, 141 F.3d at 355 (quoting Justice O’Conner’s dissent in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 615 (1990)).

^{23/} *Notice* at ¶ 41.

^{24/} *Notice* at ¶ 41.

however, minority and female-oriented programming is not what is meant by “programming diversity,” what, then, is the “programming diversity” the FCC claims EEO regulations promote?

Perhaps the Commission has been purposefully vague about the exact meaning of the term “programming diversity” because it recognizes, as did the court in *Lutheran Church*, that any real content-based definition would be impermissible under the First Amendment.

Influencing programming content, however, appears to be the Commission’s goal. Indeed, the *Lutheran Church* court posited that the real purpose behind the Commission’s asserted interest in “programming diversity” is “the fostering of programming that reflects minority viewpoints or appeals to minority tastes.”^{25/} Such a goal would, in fact, be consistent with the Commission’s professed belief “that, as more minorities and women are employed in the broadcast industry, it is more likely that varying perspectives will be aired and that programming will be oriented to serve more diverse interests and needs.”^{26/}

If, however, the Commission is to assert a content-based interest in “programming diversity,” the Commission must recognize that it is in peril of violating the First Amendment. As the court stated in *Lutheran Church*:

We do not mean to suggest that race has no correlation with a person’s tastes or opinions. We doubt, however, that the Constitution permits the government to take account of racially based differences, much less encourage them. One might well think such an approach antithetical to our democracy.^{27/}

^{25/} *Lutheran Church*, 141 F.3d at 354.

^{26/} *Notice* at ¶ 41.

^{27/} *Lutheran Church*, 141 F.3d at 355.

Thus, for the Commission to assert a public interest in the promotion of “programming diversity,” it must explain how such an interest can be asserted consistent with the First Amendment.

To do so, the Commission cannot rely on *Metro Broadcasting* and its predecessors, as it attempts to do in the *Notice*.^{28/} As *Lutheran Church* points out, even if *Metro Broadcasting* is still good law, the diversity rationale upheld in *Metro Broadcasting* was inter-station diversity, whereas the Commission’s EEO rules seek intra-station diversity.^{29/} Further, technological advances and the proliferation of media outlets call into question the entire premise behind an asserted public interest in “programming diversity.”^{30/} Indeed, assertion of such an interest would be bad public policy because any specific definition of “programming diversity” tied to female or minority employment gives rise to the “perpetuation of invidious group stereotypes” that corrupt the “bedrock of our democratic system of government and our way of life as a free and inclusive society.”^{31/}

^{28/} See *Notice* at ¶¶ 42-43.

^{29/} *Lutheran Church*, 141 F.3d at 355.

^{30/} See, e.g., *In the Matter of 1998 Biennial Regulatory Review — Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Joint Comments of Cox Broadcasting, Inc. and Media General, Inc., MM Docket No. 98-35, FCC 98-37 (filed July 21, 1998) (arguing that demise of the concept of “spectrum scarcity” dictates repeal of the daily newspaper-broadcast cross-ownership rule).

^{31/} *Lutheran Church*, 141 F.3d at 355 (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 140 (1994)); Joint Statement of FCC Chairman William Kennard and Commissioner Gloria Tristani at 1-2.

Contrary to the Commission's assertion in the *Notice*, it is *not* well established under current case law that "fostering diversity of viewpoints is a goal encompassed by the Commission's public interest mandate."^{32/} Therefore, before the Commission can find it has the authority to adopt broadcast EEO regulations, it must specifically define what is meant by "programming diversity" and explain how the Commission can promote "programming diversity" consistent with the First Amendment.

II. EVEN IF THE FCC HAS THE NECESSARY AUTHORITY TO ADOPT BROADCAST EEO RULES, THE PROPOSED RULES ARE UNCONSTITUTIONAL.

Assuming that the FCC has the authority necessary to establish EEO rules, the rules the Commission proposes cannot be adopted because they are unconstitutional. Because the Commission's proposed EEO rules are race-based under *Lutheran Church*, they must be examined under strict scrutiny and, to pass muster under this standard, the Commission must establish that its EEO regulations are narrowly tailored to achieve a compelling governmental interest. The Commission has not met its burden.

A. The Commission's Proposed Rules Are Race-Based and, Therefore, Subject to Strict Scrutiny Under *Lutheran Church*.

The *Lutheran Church* court discussed how many of the FCC's broadcast EEO rules, such as the rule requiring broadcasters to use minority-specific referral sources, involve race-based "decision-making."^{33/} The court implied that such decisions would trigger strict scrutiny under

^{32/} *Notice* at ¶ 43.

^{33/} *Lutheran Church*, 141 F.3d at 351.

Adarand. It did not, however, reach the issue of whether a regulation encouraging broad outreach must be analyzed under strict scrutiny because it found that the Commission's EEO rules "oblige stations to grant some degree of preference to minorities in hiring."^{34/}

To comply with *Lutheran Church*, the Commission proposed rules that purportedly "remove all requirements that stations compare their employment profile or employee turnover with the local labor force."^{35/} Notwithstanding its good intentions, the Commission's proposed rules would still require broadcasters to recruit with local labor force statistics in mind. While, under the new rules, broadcasters would not be required to compare their actual hires with local labor force statistics, the new rules would require broadcasters to reference local labor force statistics when conducting their recruitment efforts. Such rules are, however, the precise sort of race-based "decision-making" regulations that the court in *Lutheran Church* reviewed under strict scrutiny, and struck down as unconstitutional.

Unless the FCC plans to impose truly unworkable "one-size-fits-all" rules, its proposals logically require broadcasters to reference local labor force statistics when making recruitment and hiring decisions, the practice the court found unconstitutional in *Lutheran Church*. For example, the Commission seeks comment on whether it should require broadcasters to have a certain minimum number of female or minority recruiting sources, and on how quickly new referral sources should be substituted for old ones.^{36/} What the Commission fails to

^{34/} *Lutheran Church*, 141 F.3d at 351.

^{35/} *Notice* at ¶ 52.

^{36/} *Notice* at ¶ 65.

acknowledge, however, is that unless these requirements are tailored to a station's local labor market, a small station in homogeneous rural North Dakota will have the same EEO responsibilities as a large station in multi-ethnic urban San Diego. As it cannot be the Commission's intent to create such a disparate regulatory regime, it is obvious that such specific proposals cannot be implemented absent reference to local labor market statistics.^{37/} Even a more general rule, such as a rule requiring stations to "demonstrate that their efforts attract a broad cross section of applicants,"^{38/} is essentially meaningless absent reference to local labor force statistics: a "broad cross section" in North Dakota would not be a "broad cross section" in San Diego.

The Commission's "Self-Assessment" and "Recordkeeping" proposals also invite reference to local labor force statistics.^{39/} Obviously a station cannot assess whether it is having difficulty implementing its EEO program unless it has benchmarks against which to judge its success. For example, a successful EEO program for a small rural station in North Dakota might bring in one minority applicant for every ten applicant pools. In contrast, this same "success" rate for a large urban station in San Diego might signal absolute EEO program failure. Further, assessment of applicant pools, notwithstanding references to local labor statistics, is inherently problematic. Broadcasters cannot make applicants apply for a position, and many factors, such as unemployment rates, holidays and seasonality, affect recruitment success. Because of these

^{37/} Indeed, one of the Commission's proposals is to tailor the number of sources required to the size of the local minority labor force. *Notice* at ¶ 66.

^{38/} *Notice* at ¶ 64.

^{39/} *See Notice* at ¶¶ 72-73.

factors, vigorous recruitment efforts do not mean that minorities and women will apply for open positions. Assessment of applicant pools, in and of itself, does not reveal anything about how hard a broadcaster tried to recruit for a vacancy. In addition, requiring stations to collect race and gender information from applicants encourages stations to compare their numbers with local labor force statistics as part of the self assessment process.^{40/}

Contrary to the Commission's claims, any regulatory scheme where an agency with enforcement power imposes "race-conscious recruitment programs"^{41/} on government licensees creates the same coercive environment leading to unequal treatment on the basis of race that was found invalid in *Lutheran Church*. By attempting to impose specific EEO recruiting, recordkeeping, self-assessment and enforcement rules on broadcasters, the Commission is simply proposing to replace a regime of proportional hiring with a regime of proportional recruiting. Such a regime is nothing more than "governmental action based on race"^{42/} and is, therefore, subject to strict scrutiny: equal protection concerns are raised by a regulatory regime where some job seekers are sought after, counted, and analyzed while others are not.

The precedent cited by the Commission does not support the proposition that the government may impose race-conscious recruitment regulations on third parties without implicating equal protection. In one case cited by the Commission, *Peightal v. Metropolitan*

^{40/} Should the Commission adopt race-neutral EEO requirements as discussed in Section III below, any recordkeeping requirement must be limited to the retention of records sufficient to demonstrate that a station generally advertised the majority of its open positions.

^{41/} Notice at ¶ 21.

^{42/} *Lutheran Church*, 141 F.3d at 354, citing *Adarand* 515 U.S. at 226.

Dade County, the affirmative action plan in question was imposed by the local government on its own fire department after finding “evidence of gross statistical disparities between the population of Hispanics in Metro Dade and the relevant qualified labor pool” produced by the fire department’s prior recruitment efforts.^{43/} While the Commission is correct in noting that the Eleventh Circuit described the fire department’s outreach and recruitment activities as “race-neutral,” nothing in the case suggests that the outreach and recruitment activities of the Metro Dade Fire Department were conducted in the explicitly race-conscious manner proposed by the Commission.^{44/} The outreach program described in *Peightal* consisted primarily of high school and college recruiting programs. While these programs were designed to “provide information and solicit applications from minorities and women,” the outreach sources used were not necessarily minority or female specific.^{45/}

The second case, *Duffy v. Wolle*, similarly fails to support the Commission’s proposed rules. Again, the case involved hiring actions taken by the government, not hiring regulations imposed by the government upon someone else.^{46/} And also, again, the facts show that the recruitment practice at issue consisted of placing an advertisement in a general-source trade publication, not a female or minority-specific publication as advocated by the FCC.^{47/} Both *Peightal* and *Duffy* support the proposition that the government can impose race-neutral outreach

^{43/} 26 F.3d 1545 (11th Cir. 1994).

^{44/} *Id.* at 1558.

^{45/} *Id.*

^{46/} 123 F.3d 1026 (8th Cir. 1997).

^{47/} *Id.* at 1038-39.

activities on itself, even when those activities are undertaken to increase female and minority applicants, without implicating equal protection. *Peightal* and *Duffy* in no way, however, support the proposition that the government can impose race-conscious outreach requirements on third parties without implicating equal protection.^{48/}

The FCC's proposals are not "race neutral." They would not allow broadcasters to recruit widely in the manner best suited to their local market. Rather, they would require broadcasters to keep an eye on race at all times during the hiring process. The proposals must, therefore, be examined under strict scrutiny consistent with *Adarand* and *Lutheran Church*.

B. The Commission's Proposed Rules Cannot Withstand Strict Scrutiny.

Under strict scrutiny, a rule must be narrowly tailored to achieve a compelling governmental interest.^{49/} The Commission's proposed broadcast EEO regulations fail both prongs of the test. As an initial matter, there is no "compelling governmental interest" advanced by the Commission's proposed broadcast EEO rules. The only interest put forth by the Commission is diversity of programming and, as the Commission acknowledges in the *Notice*,

^{48/} The Commission's citations to several related cases are, likewise, inapposite. See *Notice* at ¶ 22 n.42. For example, while the court in *Monterey Mechanical Co. v. Wilson* mused that "[t]here might be a non-discriminatory outreach program which did not subject anyone to unequal treatment," the outreach program before the court was held to violate equal protection. 125 F.3d 702, 711-15 (9th Cir. 1997). Further, as in *Peightal v. Metropolitan Dade County* and *Duffy v. Wolle*, the affirmative plans in question in *Ensley Branch, NAACP v. Seibels*, *Billish v. City of Chicago* and *Shuford v. Alabama* were plans adopted by government employers imposed only on themselves, not on third parties. In addition, the plans in *Coral Const. Co. v. King County* and *Raso v. Lago* did not involve recruitment or outreach policies. *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Billish v. City of Chicago*, 962 F.2d 1269 (7th Cir. 1992); *Shuford v. Alabama*, 879 F.Supp. 1535 (M.D. Ala. 1995); *Coral Const. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991); *Raso v. Lago*, 135 F.3d 11 (1st Cir. 1998).

^{49/} See, e.g., *Lutheran Church*, 141 F.3d at 354.

the Commission's interest in promoting programming diversity was already held not "compelling" in *Lutheran Church*.^{50/} Indeed, as discussed above, the court in *Lutheran Church* favorably quoted Justice O'Connor's statement that "the interest in diversity of viewpoints provides *no legitimate*, much less important, reason to employ race classifications apart from generalizations impermissibly equating race with thoughts and behavior."^{51/}

Even if, however, programming diversity is a compelling governmental interest, the FCC has no record to show the nexus between programming diversity and broadcast EEO regulation necessary to support the "narrowly tailored" prong of the strict scrutiny test.^{52/} To survive constitutional challenge, the Commission's proposed broadcast EEO regulations must be based on a proven link between such regulations and the Commission's interest in programming diversity. For example, when the Supreme Court upheld the Commission's minority ownership preferences, it stated that "the conclusion that there is a nexus between minority ownership and broadcasting diversity . . . is corroborated by a host of empirical evidence."^{53/} The Court then went on to discuss numerous independent studies that found a link between minority ownership and the selection of topics for news coverage and the presentation of editorial viewpoint. Here, for a similar evidentiary foundation to exist, the record in this docket must contain empirical

^{50/} Notice at ¶ 13.

^{51/} *Lutheran Church*, 141 F.3d at 355.

^{52/} See, e.g., Notice at ¶¶ 44-45.

^{53/} *Metro Broadcasting*, 497 U.S. at 580.

evidence that links EEO regulation with an increase in programming diversity. As yet, no record or empirical evidence to support the proposed regulations exists.^{54/}

If the rules the Commission proposes are to pass constitutional muster, more must be shown than the mere fact that female and minority representation in the broadcasting industry has increased since EEO regulation was first imposed.^{55/} What must be shown is that, first, EEO regulation had a significant impact on female and minority representation in the broadcasting industry and, second, that this impact contributed to programming diversity. Given that, since 1971, females and minorities have achieved significant gains in many industries that have not been subject to government-mandated EEO outreach requirements, it is unlikely that even the first part of the showing can be made.^{56/} For example, between 1982 and 1997, the number of

^{54/} Over two years ago in the Commission's docket on streamlining the broadcast EEO rules, the Minority Media and Telecommunications Council submitted a study titled "EEO Programs and EEO Performance at Tennessee Radio Stations." *See In the Matter of Streamlining Broadcast EEO Rules and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules to Include EEO Forfeiture Guidelines*, Comments of EEO Supporters Volume III, MM Docket No. 96-16 (filed August 26, 1996). This study does not contain evidence upon which the Commission could base its support of its current EEO proposals. *See, e.g., In the Matter of Streamlining Broadcast EEO Rules and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules to Include EEO Forfeiture Guidelines*, Reply Comments of the National Association of Broadcasters, MM Docket No. 96-16 (filed October 25, 1996) at 9-14.

^{55/} *See Notice at ¶ 4.* Anecdotes about prior discrimination in the broadcasting industry or in society generally are irrelevant to an examination of the Commission's broadcast EEO regulations. The fact that some bad actors in the broadcasting community discriminated in the past has nothing to do with an analysis of the effectiveness of EEO regulation.

^{56/} As discussed in Section III, any showing that EEO regulation has an impact on female and minority recruiting would have to refute the common sense concept that females and minorities search for jobs using the same "traditional" resources that white males do — "Help Wanted" advertisements, trade publications, and employment agencies.

new minority law school graduates entering large law firms increased almost six-fold, while the number of new female law school graduates entering large law firms more than tripled.^{57/} Large law firms (101+ lawyers) have not been subject to any government-mandated EEO outreach requirements, yet they have dramatically increased the number of minority and female lawyers entering their ranks each year. It follows, therefore, that if other industries were able to increase their female and minority representation without government intervention, who is to say that the broadcasting industry could not have done the same?

As to the second required showing, as the court in *Lutheran Church* pointed out, “the EEO rules seek *intrastation* diversity.”^{58/} Accordingly, for its EEO rules to pass constitutional muster, the Commission must show (rather than postulate) that intrastation diversity does affect program decision making and/or contribute to eventual diversity of broadcast property ownership.^{59/} No such record currently exists.

This rulemaking is attempting to create a record that shows an empirical connection between EEO regulation (not just the benefits of a diverse workforce) and programming diversity. If, however, a strong empirical record is not forthcoming, the Joint Parties urge the Commission to step aside and leave EEO regulation to those federal and state agencies charged by law with the task. The Equal Employment Opportunity Commission (“EEOC”) and state agencies effectively police discrimination in all industries, and the Commission need not, and

^{57/} Judith N. Collins, *Employment Comparisons and Trends*, NALP Bulletin, Sept. 1998, at 12-13.

^{58/} *Lutheran Church*, 141 F.3d at 355.

^{59/} See, e.g., Notice at ¶ 44.

should not, duplicate that function.^{60/} Such duplicative regulation is a waste of scarce Commission resources in these times of multiple competing demands on the Commission. Indeed, absent a strong empirical record, the Commission cannot constitutionally impose race-conscious EEO regulations on the broadcast industry. The Commission's predilection for imposing these regulations is therefore quite puzzling.

III. IF RACE-NEUTRAL RULES ARE ADOPTED, THEY MUST ALLOW BROADCASTERS TO DESIGN THEIR OWN EEO PROGRAMS.

If the FCC finds it has the requisite authority to establish broadcast EEO rules, it should establish race-neutral rules that allow broadcasters to design their own EEO programs in the manner that best serves each station, in its own market. Because every station and market are different, broadcasters should be given maximum flexibility to design programs that meet their own unique needs if EEO rules are adopted. The FCC should adopt, at most, only its proposed "*General EEO Policy*" and "*General EEO program requirements.*"^{61/} It should not adopt its proposals for specific recruitment and recordkeeping requirements inasmuch as these require references to race and are, therefore, unconstitutional.

Adoption of race-neutral rules would also serve the public interest behind the Commission's specific proposals. For example, as the *Notice* states, the purpose of a recruitment

^{60/} See, e.g., *Lutheran Church*, 141 F.3d at 354 ("As we have observed elsewhere, 'the FCC is not the Equal Opportunity Commission. . . .'" (citing *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 628 (D.C. Cir. 1978) (*en banc*)).

^{61/} Proposed as § 73.2080(a) and (b).

rule is to “guard against insular effects of word-of-mouth recruiting.”^{62/} Consequently, so long as broadcasters generally advertise a majority of their positions, that should be a sufficient safeguard. Further, unless the Commission has data to suggest that minorities or women look for broadcasting jobs differently from how they look for jobs in other fields, broadcasters should not be required to find artificial minority- or female-specific recruitment sources to reach a broad range of qualified candidates — most persons seeking jobs look to general sources for job advertisements. If a broadcaster advertises a position using “Help Wanted” ads, employment agencies, or trade publication ads, the broadcaster should be deemed to have recruited widely for the subject position, as all persons seeking employment, including minorities, look there. It is, in fact, the Joint Parties’ experiences that general recruitment sources are far more effective in producing qualified minority and female candidates than minority and female specific sources.^{63/}

Adoption of race-neutral rules also would necessarily preclude the Commission from requiring (or even asking) that broadcasters record and disclose the racial make-up of their workforce either annually or in connection with a license renewal. No public interest is served by requiring broadcasters to count their employees with an eye towards race and gender. In fact, any such “head count” only invites mischief as such a survey naturally leads to comparisons,

^{62/} Notice at ¶ 61.

^{63/} Broadcasters can, of course, always choose to use targeted recruiting sources and independently seek to advertise positions with female and minority recruiting sources in order to improve their applicant pools, but the decision of exactly how to use what sources should be made by each individual broadcaster, not by the FCC.

whether officially or unofficially, with local labor force statistics.^{64/} Further, as the Commission has recognized, the EEOC already requires broadcasters to complete a similar survey, thus making any sort of FCC survey duplicative, unnecessary and a waste of taxpayer-funded federal resources.^{65/}

Also to be avoided is the Commission's proposal to reverse its long-standing policy against considering allegations pending before other tribunals. For over 20 years the Commission appropriately has refused to review allegations of misdeeds involving "non-FCC misconduct" until such conduct is adjudicated in the relevant forum.^{66/} Now, in contrast, the Commission proposes to collect "evidence" of discrimination and asks whether the FCC should be contemporaneously notified of discrimination complaints filed with the EEOC.^{67/} No purpose would be served by either proposal. The FCC is not the federal agency charged with the task of

^{64/} Broadcasters may, for their own business reasons, wish to conduct such a survey of their employees as part of a voluntary effort to reach out into their own communities. The harm is created when such surveys become mandatory and when they are publicly disclosed.

^{65/} The Commission has recognized that the EEOC's "EEO-1" form collects and reports similar data to that collected by the Commission on FCC Form 395, with the only exception being that the EEO-1 form does not distinguish between full-time and part-time employees. *See In the Matter of 1998 Biennial Regulatory Review -- Amendment of Sections 73.3612 and 76.77 of the Commission's Rules Concerning Filing Equal Opportunity Annual Employment Reports*, Memorandum Opinion and Order, FCC 98-039 (released March 16, 1998).

^{66/} *See, e.g., Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 102 FCC 2d 1179, 1204-05 (1986), *recon. granted in part, denied in part*, 1 FCC Rcd 421 (1986) ("It is our current practice to ordinarily refrain from taking any action on non-FCC misconduct prior to adjudication by another agency or court. In the future, our current practice will be our actual policy. We will not take cognizance of non-FCC misconduct . . . unless it is adjudicated. In this regard, there must be an ultimate adjudication by an appropriate trier of fact, either by a government agency or court, before we will consider the activity in our character determinations.").

^{67/} Notice at ¶ 60.

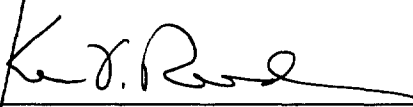
reviewing discrimination complaints and should not presume to take on such a function. It does not have the staff or the resources to investigate pending EEOC charges and should not expand its public interest mandate to intrude on another agency's mission.

Broadcasters should not be required to do more than have an EEO program that complies with applicable EEOC, state and local requirements, recruit in a general manner for most open positions, and not discriminate. If the FCC finds it has the requisite authority to establish broadcast EEO rules, it should allow broadcasters to design their own EEO programs that best serve the needs of their own local communities, something broadcasters are eminently suited to do.

Respectfully submitted,

**EVENING POST PUBLISHING COMPANY
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